

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

In the Matter of)
)
FIRST STUDENT, INC.)
)
and)
)
GENERAL TEAMSTERS LOCAL)
UNION NO. 174, affiliated with the)
INTERNATIONAL BROTHERHOOD)
OF TEAMSTERS)

**Case Nos.: 19-CA-090217
19-RC-082833**

RESPONDENT'S POST HEARING BRIEF

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Now comes the Respondent, First Student, Inc., and files this Post-Hearing Brief in lieu of closing argument for the hearing that took place on January 8, 2013 for the above captioned cases.

I. STATEMENT OF FACTS

First Student, Inc., a FirstGroup America company, is a private sector transportation company that provides student bus services. It enjoys a unique history of more than fifty years in the passenger transportation industry, serving public agencies and private businesses, operating in nearly all states and several US territories. Throughout its existence, First Student has strived to be the preferred employer in the transportation industry. For this reason, the Employer has over 1100 locations that privately contract with local government and municipalities to provide student bus services for the community.

First Student has several facilities located in Seattle, WA under a contract for the Seattle School District. Jt. Mot. and Stip., ¶ 1. These drivers at these facilities petitioned for an election on June 11, 2012 and the Regional Director approved a Stipulated Election agreement on June 22, 2012. *Id.* at ¶2-3. Due to the seasonal nature of a school bus driver, First Student and the Union stipulated the election taking place during the upcoming school year.

Historically, First Student has given drivers raises at the beginning of each school year. First Student has a tiered wage scale for many of its locations, including Seattle. *See id.* at ¶5. The tiers at the Seattle location are based on years of service. Instead of receiving traditional percentage raises, drivers in tiers 1 through 8 will move to the next tier in the wage scale. *See id.* Drivers at the top tier, tier 9, will receive a percentage increase. Over the past several years, this tier 9 wage increase has ranged from 2.1% to 8.4%. *See id.* at ¶7.

In August 2012, First Student gave drivers in tiers 1 through 8 a pay raises by moving them to their next respective tier in the wage scale. Due to the varying level of raises given in previous year, First Student decided to delay the tier 9 wages until after the election. The Employer did not want to be faced with a charge that it was discouraging membership in the Union by giving them a raise which has historically been inconsistent. First Student put the drivers on notice of this decision in a memo that was placed in each drivers' mailbox. *See id.*, Attachment A. The Employer stated that "...the company is prohibited by federal law from making unilateral changes to the current pay scale when there is a union election pending." *Id.*

On September 18, 2012, Board Agents conducted the election at the Employer's four Seattle facilities. The Employer won the election. Mr. Drummond, a tier 9 driver, testified that approximately a week after the election he asked Contract Manager Gail Heaton when the tier 9 would receive their wage increase. According to Mr. Drummond, Ms. Heaton responded that they would have to wait because there were still objections to the election.

On or about January 2, 2013, a memo was sent to the tier 9 drivers informing them that they would receive their wage increase retroactive to August 2012. *See Res. Ex. 1.*

II. ARGUMENT

First Student neither committed any objectionable behavior nor unfair labor practice during the course of the election. The alleged conduct of two isolated drivers that said anti-union remarks did not disrupt the laboratory conditions of the election. Additionally, the Employer was put in a no-win situation during the course of the election. Due to the inconsistent nature of the tier 9 wages, giving an increase could have been grounds for unfair labor practice for discouraging union membership. For this reason, the Employer delayed the implementation of the increase until after the election.

A. The Employer's action of delaying the implementation of tier 9 wages was lawful and prudent given that the Employer put the drivers on notice that this action was being taken while the election was pending and the raises were given to the drivers after the election.

The allegations that the Employer deprived employees of wages in order to discourage membership are misplaced. First Student gave the standard wage increases to those drivers participating in the election that were in tiers 1 through 8. The Employer merely delayed the implementation of tier 9 wages until after the election in order to avoid the perception of “vote buying” those tier 9 employees.

The decision to delay the implementation of wages in order to avoid the perception of impropriety is not unprecedented with the Board. In *Uarco, Inc.* 169 NLRB 1153, 67 LRRM (BNA) 1341 (1968), a company handled this conundrum in a similar manner. A petition was filed on December 8, 1956 and the election was conducted on May 26, 1967. *Id.* The company regularly gave raises in April of each year. *Id.* The company delayed the wage increases to those employees certified by the election petition and notified the employees that the wages will have to be postponed for all employees involved in the pending NLRB cases. *Id.* The company feared that wage increases during the course of the election might be considered an unfair labor practice, and the company should not take this risk. *Id.* The company also would not discuss whether the rate increases would be retroactive while the election was pending. *Id.* at 1154. After the election, the company put the wage increase into effect retroactively for the employee voting in the election. *Id.*

The Board analyzed this course of conduct and overturned the Regional Director's decision to set aside the first election and direct a new election. The Board reasoned that the company made clear in its statements

“...that whether or not its employees were represented by a union, it planned to continue its established practice of adjusting wages rates in early April of each year, pursuant to its annual wage survey, to bring them in conformity with the prevailing rates in the areas; and that the sole purpose of its announcement postponing the expected adjustments in wages rates and benefits for the employees involved was to avoid the appearance that it sought to interfere with their free choice in any elections that might be directed.”

Id.

The Employer took similar actions to that in *Uarco, Inc.* Unlike *Uarco, Inc.*, First Student actually gave wage increases to a number of drivers. This was possible because the structure to give employees in tiers 1 through 8 raises was already in place. The Employer was concerned only with the perception of impropriety with the tier 9 employees.

Like *Uarco, Inc.*, First Student sent out a memo to the employees informing them that the reason for not giving the tier 9 wage increases was “...because the company is prohibited by federal law from making unilateral changes to the current pay scale when there is a union election pending.” Jt. Mot. and Stip., Attachment A. The Employer did not state that the tier 9 wages were being withheld due the Union or to discourage Union membership. First Student delayed the wages *when there was a union election pending* so as to not give the impression that it was making unilateral changes to the drivers’ terms and conditions of employment during the election. The Employer had every intention to give the tier 9 wages to its employees and did in fact give those tier 9 employees wages after the election. This is further evidenced by the testimony of Mr. Drummond that Contract Manager Gail Heaton expressed to him that there were still objections to the election and that tier 9 wages would still be delayed.

At no time was the delay of tier 9 wages for the purpose of discouraging Union membership. Moreover, the tier 9 wages were being withheld for the purpose of creating a neutral environment in the lead up to the election. First Student wanted a fair, impartial election

conducted without any possibility of objectionable behavior. The Employer determined that the best way to do this was to give the standard wages to those employees in tiers 1 through 8 while delaying the wage increases to those employees in tier 9. Due to the inconsistent pattern of wage increases over several years, the Employer minimized the risk of an unfair labor practice for an improper raise while notifying those affected employees that their raise would not be given while the union election was pending.

B. The isolated actions of two drivers did not destroy laboratory conditions of the election.

The alleged isolated statements by two drivers during the course of the election did not destroy laboratory conditions nor prejudice the Union in any way. The drivers were not supervisory employees as defined under the Act. While the alleged statements were made while they voted in the election area, the drivers were promptly told by the Board Agent to leave the election area. The two drivers obeyed the Board Agent's directives. Furthermore, everyone that witnessed the statements in the election area continued to vote and were not obstructed from casting their ballot.

III. CONCLUSION

The Employer delayed the tier 9 wages while the election was pending in order to avoid any charges of buying the tier 9 employees' votes. First Student gave wages to all drivers in tiers 1 through 8 and informed the tier 9 drivers that their raises would not be given while the union election was pending. The tier 9 drivers received their raises retroactive to August 2012 after the election. Also, the independent statements of two drivers did not destroy laboratory conditions of the election. For this reason and all other reasons stated above, First Student respectfully requests that the September 18, 2012 election results be certified and the unfair labor charge be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the National Labor Relations Board's Rules and Regulations, I served the foregoing RESPONDENT'S POST-HEARING BRIEF electronically to:

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